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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

**IN RE GRAND JURY MATTER.**

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) Case No. 1:04MC00052  
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) **OPINION AND ORDER**  
)  
) By: James P. Jones  
) Chief United States District Judge  
)

In this grand jury matter, certain witnesses who have previously testified or who are subpoenaed to testify in the future, move the court for an order requiring the United States to identify the documents shown to them (or which may be shown to them) during their testimony.

Previously, certain of these witnesses, by counsel, orally moved the court to require the United States to permit them to take personal notes during their testimony in order to allow them to record the Bates number or date of documents shown to them during their testimony.<sup>1</sup> After oral argument, the motion was denied. The court

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<sup>1</sup> There are apparently numerous documents in this investigation, some of which were obtained by the government from the witnesses' employer and relate to the jobs performed by the witnesses. Counsel for the witnesses also have access to copies of the documents and thus could more easily retrieve the text of a document shown to a witness if they had the number or date of the document. Since counsel is not permitted to appear with a witness in the grand jury room, and since the witness may not be able to remember the details of many

did suggest that government counsel consider advising counsel for the witnesses of the identity of the documents:

THE COURT:

. . . .

It would seem to me that it might be wise for the Government to consider, particularly where there are a limited number of documents, to advise counsel of the identity of those documents, particularly if the witness has, is uncertain about them, because it does seem to me to lead to the better evidence before the grand jury if the witness has an opportunity even after their testimony, to review those, those documents.

(Tr. Aug. 26, 2004, at 41.)

The government decided not to follow this suggestion by the court, and now declines to identify any such documents that have or will be shown to these witnesses before the grand jury, thus prompting the present motion.

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documents shown to her during her appearance, counsel may be otherwise hindered in the later debriefing of the witness. Neither the parties nor the court has been able to find case authority on the question of whether a grand jury witness may take notes during her testimony, but it is apparently permitted by some federal prosecutors. *See* William B. Wachtel & Elliot Silverman, *Representing Witnesses Before Grand Juries: A New Approach to an Old Problem*, N.Y.L.J., May 15, 1992, at 1 (“Recently, in preparing a witness for a grand jury appearance, we came upon a solution so simple, so obvious, that it has apparently been overlooked until now: we told the client to bring a pencil and notebook into the grand jury room and take notes. The Assistant U.S. Attorney, although resistant at first to permitting this novel practice, could find no authority denying a witness the right to take notes . . . [and] the witness was, indeed, permitted to take notes.”).

While the federal rules of criminal procedure do not impose a secrecy obligation on grand jury witnesses or their counsel, *see* Fed. R. Crim. P. 6(e), there is still a “general veil of secrecy which covers grand jury proceedings.” *Bast v. United States*, 542 F.2d 893, 896 (4th Cir. 1976). Accordingly, the rule in this circuit is that a grand jury witness is not entitled to a transcript of her testimony, even for the purpose of reviewing it to correct any inadvertent errors in the testimony, unless there is some particularized need shown. *See id.*

The *Bast* rule covers the movants’ motion in the present case. They have shown no special need for later identification of the documents shown to them during their grand jury testimony, other than to make sure that their testimony was accurate. I continue to believe that the government would be wise to voluntarily disclose this information, in order to better insure accurate testimony before the grand jury. In the event a witness later gives inconsistent testimony concerning a document, it may be hard for the government to impeach the witness with her grand jury testimony in the face of the explanation that government counsel refused to allow the witness an opportunity to study the document. Nevertheless, in view of *Bast*, I am unable to require the government in this situation to follow what I believe to be the better practice.

For these reasons, it is **ORDERED** that the Motion to Compel Identification of Documents is DENIED.

ENTER: October 27, 2004

/s/ JAMES P. JONES  
Chief United States District Judge